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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NOEMEE GABISAN, on behalf of herself, and on behalf of all persons similarly situated,

Plaintiff,

vs.

PELICAN PRODUCTS, INC.; and, Does 1 to 10,

Defendants.

CASE No. 08 CV 1361 JM (NLS)

PLAINTIFF'S NOTICE OF EMERGENCY MOTION AND EMERGENCY MOTION FOR CORRECTIVE NOTICE TO MEMBERS OF PUTATIVE CLASS

Judge: Hon. Jeffrey T. Miller
Dept.: Courtroom 16, 5th Flr

Hearing Date: September 19, 2008
Hearing Time: 1:30 p.m.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 19, 2008 at 1:30 a.m., or as soon as this matter can expeditiously be heard, before the Honorable Jeffrey T. Miller in Courtroom 16 of the United States District Court for the Southern District of California, Plaintiff Noemee Gabisan will move and hereby does move for an order granting Plaintiff's Emergency Motion for Corrective Notice to the Members of the Class.

The motion is brought pursuant to and in accordance with Fed. R. of Civ. Proc. 23, and is based upon this notice, the accompanying memorandum of points and authorities and attached exhibits, the declaration of Plaintiffs Gabisan and Wilson-McGhee, the argument of counsel, and upon such other material contained in the file and pleadings of this action.

BLUMENTHAL & NORDREHAUG

Dated: August 14, 2008 By: *s/Norman B. Blumemthal*
Norman B. Blumenthal, Esq.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NOEMEE GABISAN, on behalf of herself, and on behalf of all persons similarly situated,

Plaintiff,

vs.

PELICAN PRODUCTS, INC.; and, Does 1 to 10,

Defendants.

CASE No. 08 CV 1361 JM (NLS)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EMERGENCY MOTION FOR CORRECTIVE NOTICE TO MEMBERS OF PUTATIVE CLASS

Judge: Hon. Jeffrey T. Miller
Dept.: Courtroom 16, 5th Flr

Hearing Date: September 19, 2008
Hearing Time: 1:30 a.m.

This Memorandum is filed in Support of Plaintiff's Emergency Motion for an Order Directing a Curative Communication on behalf of Plaintiff Noemee Gabisan ("Plaintiff") and all employees similarly situated.

I. INTRODUCTION

On or about July 28, 2008, Plaintiff filed this action on behalf of herself and on behalf of a California Class and a Collective Class (the "Classes") of similarly situated employees (the "Action"). The Action alleges that Pelican Products, Inc. ("Defendant") employed unlawful, unfair, and deceptive exemption classification policies and practices in violation of the California Business and Professions Code § 17200, *et seq.* (the "UCL") and the California and Federal labor laws in order to deny Plaintiff and the putative Classes overtime pay. As a result, Plaintiff contends that she and the members of Classes should be paid restitution to recover unpaid overtime wages as allowed by the UCL based upon the Defendant's challenged exemption classification policies and procedures that wrongfully and systematically misclassified Plaintiff and the members of the Classes as employees "exempt" from overtime laws and other applicable federal and state regulations.

Shortly after Plaintiff filed this Action, Defendant Pelican Products, Inc. distributed an "Agreement and Release" (the "Release") to the members of the putative Classes (the "Class Members"), except for the Plaintiff. *See* Release, Exhibit #1. Enclosed with the Release is a cover letter, which was sent to Plaintiff and all Class Members, entitled "Reclassification from Salary to Hourly status Retroactive to July 16, 2008." *See* Cover Letter, Exhibit #2.

The Release states, in relevant part, that:

> Pelican Products, In.c ("Pelican") has decided to reclassify as non exempt certain job positions, including your job position. Pelican also has decided to pay you an amount equal to or in excess of amounts you would have been paid had your position been classified as non exempt during [add time period], plus interest in the amount of ten (10) percent.

Release, Exhibit #1.

In exchange for the payment offered above, the Release purports to waive any and all claims asserted by Plaintiff. Id.

Defendant's pre-certification contact with the putative class members is not comprised solely of individual meetings held in connection with the distribution of the Release. Rather, Defendant has continued to meet and communicate with Class Members to secure the signatures of these employees on the Releases. *See* Declaration of Noemee Gabisan, filed concurrently herewith ("Gabisan Decl.") at ¶2; Declaration of Carole Wilson-McGhee, also filed concurrently herewith ("Wilson Decl.") at ¶6-7.

The Releases have caused considerable amounts of confusion to the Class Members. As a result, several Class Members have inquired further regarding the Release in order to clarify confusing and misleading terms stated in the Release. In response, instead of recommending that the putative class members seek independent advice of counsel to evaluate the prudence of entering into the Release, Defendant's employees have been urging the putative class members to sign the release and worry about the terms of the Release later. *See* Wilson Decl. at ¶8.

For example, in paragraph 1, the Release asks the signing employee to acknowledge that the amount of hours worked in excess of "regular time hours" is the time that is "shown on Pelican's Kronos Time & Attendance System." One of the Class Members, Ms. Wilson-McGhee notified a representative from Defendant's human resources division that substantial amounts of overtime are not recorded on the Kronos System, such as those hours she worked at trade shows. *See* Wilson Decl. at ¶4. Instead of offering to revise the document to recalculate the backpay owed with the additional hours Ms. Wilson-McGhee worked at the trade shows, Defendant's representative urged Ms. McGhee-Wilson to immediately sign the Release as formulated. Id. at 8.

The Release also inaccurately claims that the Kronos System has accurately recorded the total amount of time worked because Class Members were often told on weekends not to log into the Kronos System. Gabisan Decl., ¶5. As a result, the Class Members are being asked to falsely state that they did not work more than the "time [that] is shown on Pelican's Kronos Time & Attendance System." Further, the statement in paragraph 1 of the Release that the employee "accurately recorded his or her time on Kronos Time & Attendance System" is also a falsity that warrants corrective notice.

A further discrepancy in the Release is embodied in the misrepresentation that Defendant will be paying "an amount equal to or in excess of amounts [the employee] would have been paid had [the] position been classified as non exempt..." *See* Release, Exhibit #1. This statement is a misrepresentation because, as described above, an incorrect amount of time worked as recorded by Kronos is being used to calculate the amount of pay. Further, the statement is also false because the rate of pay used to calculate the Class Members' overtime rate of pay is based on a lower salary that was paid to the Class Members during the year 2007. Consequently, the amount calculated will represent a substantial underpayment since overtime hours were worked by many Class Members in 2008 at a higher salary which, therefore, necessitates calculations at a higher rate of pay.

Finally, the Releases purport to waive the Class Members' claims pursuant to the Fair Labor Standards Act, 29, U.S.C. § 201, *et seq.* in exchange for receipt of the payment allocated by paragraph 1 of the Release. This waiver of claims under the FLSA is void as a matter of public policy. *See* Ladegaard v. Hard Rock Concrete Cutters, Inc., 2001 U.S. Dist. LEXIS 18370, *3-10. As a result, the statements in the Release that purport to release such claims is an example of a further misrepresentation to which Defendant is actively attempting to persuade each Class Member to assent.

In order to protect the Class Members from the coercive conduct and misrepresentations effected by Defendant's Release and actions take thereto, Plaintiff hereby respectfully requests the Court to order that, pursuant to Fed. R. Civ. Proc. 23(d), a Court-approved notice be sent to each Class Member who received a release stating that the release is voidable in its entirety by the Class Members, that signing the Release does not prohibit participation in this litigation, and that Defendant cannot retaliate against anyone for participating in the lawsuit.

II. LEGAL ANALYSIS

Federal Rule of Civil Procedure 23(d) provides that in the conduct of class actions, "the court may make appropriate orders: . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, ..." Fed. R. Civ. P. 23(d). Communications that contain incorrect information are particularly a subject of "a curative notice from the court, at the expense of those at fault." See MANUAL FOR COMPLEX LITIGATION § 30.24 (3d ed. 1995).

The Supreme Court has held that Rule 23 allows a court, in appropriate circumstances, to restrict communications between a party and members of a class or putative class. Gulf Oil v. Bernard, 452 U.S. 89, 68 L. Ed. 2d 693, 101 S. Ct. 2193 (1981). Acknowledging the possibility of abuses in class action litigation, but seeking to avoid infringing parties' rights, the Supreme Court held that:

> An order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.

Id. at 101 (footnotes omitted).

Although Gulf Oil concerned communications between counsel for the named plaintiff and potential class members, the rationale of this case has been found to apply to communications between defendants and potential class members as well. See, e.g., Bublitz v. E.I. DuPont de Nemours & Co., 196 F.R.D. 545, 547 (S.D. Iowa 2000); Abdallah v. Coca-Cola Co., 186 F.R.D. 672, 675 n.1 (N.D. Ga. 1999). A court's power to restrict communications between parties and potential class members, apply even before a class is certified. See, e.g., Bublitz, 196 F.R.D. 545; Burrell v. Crown Cent. Petroleum, Inc., 176 F.R.D. 239, 242-43 (E.D. Tex. 1997).

Here, the letter and release sent out by defendants contained incorrect information as to (a) the ability of Class Members to waive certain claims at issue in this lawsuit, (b) the Defendant's intention to pay amounts equal to or in excess of the amounts owed had the Class Members been properly classified as exempt, and (c) the Defendant's calculation of the actual amount of time worked by the Class Members. As a result, such corrective measures are respectfully requested by Plaintiff and warranted in this case. Id. Absent action from the Court, "[u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent...The damage from misstatements could well be irreparable." Kleiner v. First Nat'l Bank, 751 F2d 1193 at 1203.

> The solicitation of exclusions from a pending class action by a defendant before the court has determined that the case may proceed as a class action constitutes a serious challenges to the authority of the court to have some control over communications with class members. Unauthorized communications in a franchise class action, for example, may result in settlements by so many franchisees as to eliminate satisfaction of the numerosity requirement of Rule 23(a)(1)...
>
> ...Courts are concerned that such communications may prevent class members from making informed decisions about exclusion. "It is the responsibility of the court as neutral arbiter, and of the attorneys in their adversary capacity, to insure this type of free and unfettered decision" to opt out of the class or not.

3 Newberg on Class Actions, "Solicitations by Defense Counsel fo Exclusions and Individual Settlements," § 15.19, *citing* Impervious Paint Indus. V. Ashland Oil, 508 F Supp 720, 723 (WD Ky), *appeal dismissed*, 559 F.2d 1081 (6th Cir. 1981). Indeed, if courts allow "defendants to make an end-run around its supervisory authority, the principle that will be established for future class actions is unconscionable." In re Federal Skywalk Cases, 97 FRD 370, *377 (WD Mo 1983).

To guard against such unilateral communications, which are "rife with potential for coercion," the Court may issue a remedial order pursuant to Fed. R. Civ. P. 23(d). "The issuance of a remedial order under Fed. R. Civ. P. 23(d) does not require a finding of actual harm." Georgine v. Amchem Prods., 160 F.R.D. 478, 498 (E.D. Pa. 1995). Rather, a "remedy is appropriate if the communications at issue create a 'likelihood' of abuse, confusion, or an adverse effect on the administration of justice." Id.

III. DEFENDANT'S COMMUNICATIONS WITH THE CLASS MEMBERS HAS CREATED A LIKELIHOOD OF ABUSE, CONFUSION, AND AN ADVERSE EFFECT ON THE ADMINISTRATION OF JUSTICE

Here, the likelihood of abuse resulting from the distribution of the Release and the Defendant's subsequent communications to Class Members is readily apparent.

When confronted by Class Members with concerns regarding the misrepresentations made in the Release, Defendant does not try to fairly ensure that the Class Members' concerns are addressed. Instead, with the abusive intent of securing a waiver of all claims asserted in this Action, Defendant pressures Class Members to sign the Release *before* the Release is reformatted to address the issues that were brought to Defendant's attention. Wilson-McGhee Decl., ¶ 8.

In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704-07, 89 L. Ed. 1296, 65 S. Ct. 895 (1945), the Supreme Court held that FLSA rights are nonwaivable. In cases where defendants have attempted to advise putative class members to the contrary, courts have held that corrective measures are necessary. *See* O'Brien v. Encotech Constr. Servs., 183 F. Supp. 2d 1047, 1052 (N.D. Ill. 2002) (holding that releases purporting to waive FLSA claims executed by defendant's employees are void as a matter of law and orders that corrective notices must be sent to employees who executed such releases); Ladegaard v. Hard Rock Concrete Cutters, Inc., 2001 U.S. Dist. LEXIS 18370.

The Release also purports to pay the Class Members over and above the amount they would have received had they properly been classified as non exempt. Omitted from the terms of the Release, however, is the fact that the Class Members' overtime rate of pay for all overtime hours worked is being calculated based on the lowest salary received by the Class Members.

Another misrepresentation is that the Class Members are being paid for all time worked. This statement is altogether false because the time used for the payment calculations is based on the time recorded in the Defendant's Kronos Time System. This system, however, does not record (a) hours worked by the Class Members at the Defendant's trade shows or (b) hours worked during the weekends where Defendant ordered Class Members not to log into the Kronos Time System. *See* Gabisan Decl. at ¶ 5; Wilson-McGhee Decl. at ¶ 4.

In cases where Class Members have received such false, material information, the courts are authorized under Fed. R. Civ. Proc. 23(d)(2) to issue corrective notices. *See, e.g.*, Georgine v. Amchem Prods., 160 F.R.D. 478, 502 (E.D. Pa. 1995) (ordering curative notice to those class members who originally opted out due to false information); Ralph Oldsmobile, Inc. v. GMC, 2001 U.S. Dist. LEXIS 13893 (S.D.N.Y. Sept. 7, 2001)(granting motion for remedial action under Fed. R.

Civ. P. 23 for notice to potential members of the putative class giving any potential member of the putative class who has signed a release an opportunity to apply to the court have that release voided).

IV. CONCLUSION

For the reasons stated hereinabove, Plaintiff hereby respectfully requests the Court to order that, pursuant to Fed. R. Civ. Proc. 23(d), a Court-approved notice be sent to each Class Member who received a release stating that the release is voidable in its entirety by the signer, that signing the Release does not prohibit participation in this litigation, and that Defendant cannot retaliate against anyone for participating in the lawsuit.

BLUMENTHAL & NORDREHAUG

Dated: August 14, 2008

By: *s/Norman B. Blumemthal*
Norman B. Blumenthal, Esq.

EXHIBIT 1

Pelican Products

HR Department

23215 Early Ave., Torrance, CA. 90505
(310) 326-4700 x616; FAX: (310) 326-2466

Date: **August 1, 2008**

To:

From: **Ellenmary Michel**
Director of Human Resources

Re: **Reclassification from Salary to Hourly status**
Retroactive to July 16, 2008

When changes in an employee's classification status occurs, it is important that Human Resources documents the change in writing and ensures that you receive appropriate information to assist you with questions that might arise during the transition.

Retroactive to July 16, 2008, your salaried status will be **reclassified to hourly non-exempt.** Your job title and grade level will remain the same, however your semi-monthly salary of

Your work schedule will continue to be 8:00am – 5:00pm Monday through Friday. Please be advised that additional hours may be required based on department needs and special projects with or without prior notification. You will, however, be paid an overtime rate for all hours worked over 8 in a day and over 40 in a week.

You will no longer be paid for portions of days or weeks in which you are absent due to illness. To assist with this transition, Pelican will provide you with 40 hours sick pay to use immediately. You will continue to accrue sick pay at a rate equivalent to 40 hours per year.

In closing, please be advised that nothing in this document is meant to alter the "At-Will" policy in effect at Pelican Products, which stipulates that employment can be terminated by the employer or by the employee at any time, for any reason or for no reason, with or without cause or advance notice.

Please feel free to see either myself or Dana Brooks if you have questions regarding the reclassification in status.

EXHIBIT 2

AGREEMENT AND RELEASE

Pelican Products, Inc. ("Pelican") has decided to reclassify as non exempt certain job positions, including your job position. Pelican also has decided to pay you an amount equal to or in excess of amounts you would have been paid had your position been classified as non exempt during [add time period], plus interest in the amount of ten (10) per cent. In light of the foregoing, "Employee") **and Pelican** hereby agree as follows:

1. Pelican will pay to Employee the sum of applicable withholdings. This payment is in full and complete satisfaction of any amounts Employee may claim for overtime pay, or for interest on any claimed overtime pay (the "Overtime Payment"). Employee acknowledges that s/he is entitled to no other salary, wages, commissions, incentive compensation, options, benefits, insurance or other compensation of any kind arising out of the Overtime Payment, except as specifically set forth herein. Employee further acknowledges, warrants and represents that s/he worked not more than hours in excess of regular time hours, which time is shown on Pelican's Kronos Time & Attendance System. Employee acknowledges, warrants and represents that s/he accurately recorded his or her time on Kronos Time & Attendance System.

2. In exchange for the payment in paragraph 1, Employee hereby releases and discharges to the fullest extent permitted by law Pelican, its parent and subsidiary corporations and affiliates, and each of their officers, servants, employees, attorneys, insurers, successors and assigns from any and all claims, demands, obligations, liabilities, actions, costs, debts and causes of action of every nature, known or unknown, which have existed or now exist and which are in any way connected with, or arise out of, any claim for unpaid overtime or interest thereon, including, but not limited to, claims or causes of action based on or arising out of any alleged breach of contract, breach of implied covenant of good faith and fair dealing, unfair competition, common law torts, and claims of any kind under federal, state and/or local law including but not limited to the Fair Labor Standards Act, the California Labor Code and the California Unfair Competition Laws. Employee acknowledges that s/he has been informed of, and is aware, of the putative class action filed in the United States District Court, Southern District of California, encaptioned Noemee Gabisan v. Pelican Products, Inc., CV 1361 JM NLS, which includes but is not limited to allegations that "Sales Support Staff Members" are entitled to overtime pay. Nothing in this paragraph is intended to limit Employee's participation in any proceeding brought by any federal, state or other governmental agency to the extent such participation is protected by law. To the extent that any alleged claim arising out of the Overtime Payment is not or cannot be released under current law, the payment provided by Pelican in this Agreement shall be an offset against any such unreleased claim, if any.

3. Employee specifically and expressly waives and releases all rights under the provisions of Section 1542 of the Civil Code of California, which provides as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Thus, for the purpose of implementing a full and complete release of the Company and others released herein, Employee expressly understands and agrees that this release is intended to include in its effect, without limitation, claims and causes of action which s/he does not know of or suspect exist in his/her favor and that this release extinguishes all such claims and causes of action.

4. Neither this Agreement nor anything in it shall be considered as any admission by Pelican of any preexisting obligation or improper conduct whatsoever. Pelican denies any such obligations or improper conduct.

5. Employee has read this Agreement, understands its contents, and is signing this Agreement voluntarily. Employee acknowledges that s/he has been given eleven days to consider this Agreement, and has been given the opportunity to consult with a lawyer at his or her option and expense.

6. The making, execution and delivery of this Agreement has been induced by no promises, representations, statements, warranties or agreements other than those expressed herein. This Agreement supersedes all prior discussion and agreements between Employee and the Company regarding the Overtime Payment, whether oral or in writing.

Dated: ________________ ______________________________

Dated: ________________ ______________________________

Ellenmary Michel
Director of Human Resources for
Pelican Products, Inc.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NOEMEE GABISAN, on behalf of herself, and on behalf of all persons similarly situated,

Plaintiff,

vs.

PELICAN PRODUCTS, INC.; and, Does 1 to 10,

Defendants.

CASE No. 08 CV 1361 JM (NLS)

DECLARATION OF NOEMEE GABISAN IN SUPPORT OF PLAINTIFF'S MOTION AND EMERGENCY MOTION FOR CORRECTIVE NOTICE TO MEMBERS OF PUTATIVE CLASS

Judge: Hon. Jeffrey T. Miller
Dept.: Courtroom 16, 5th Flr

Hearing Date: September 19, 2008
Hearing Time: 1:30 p.m.

I, NAOEMEE GABISAN, declare:

1. I have personal knowledge as to the facts stated in this declaration. If called as a witness, I could and would competently testify to the truth of the facts stated in this declaration. I make this declaration in support of Plaintiff's Emergency Motion for Corrective Notice.

2. I am the Plaintiff in the above entitled action and I have worked for Pelican Products, Inc. ("Defendant") since in or about September of 2006. On or about August 1, 2008, I was informed by several of my coworkers that they had attended a meeting with, Ellenmary Michael, Director of Defendant's Human Resources division. Ms. Michael had presented each of them with an "Agreement and Release" (the "Release"), which contains a purported waiver of claims asserted in the action, Noemee Gabisan v. Pelican Products, Inc., 08 CV 1361 JM (NLS). This waiver is the basis of Plaintiff's Emergency Motion for Corrective Notice.

3. Many similarly situated employees employed by the Defendant ("my co-workers") have approached me to voice their concerns and confusion regarding the terms of the Release. One of my co-workers provided me with a redacted copy of the Release for me to forward to my counsel of record. This action was taken by my co-worker because she was concerned and confused about the terms stated in the Release. After I forwarded a copy of the redacted Release to my counsel of record, I had the opportunity to review the terms of the Release.

4. One of the primary concerns voiced to me by some of my co-workers regarding the Release was that the rate of pay used to compensate them for the overtime they are owed for hours worked during this year and the last would only be based on the lower rate of pay received last year in 2007. Although the Release also purports to pay my co-workers for the overtime they worked during the year of 2008, the Release uses one rate of pay based on the older and lower salary for the entire time period.

5. The Release inaccurately states that the time worked by myself and my co-workers was accurately recorded on "Pelican's Kronos Time & Attendance System." This statement is inaccurate because on many occasions, I worked many overtime hours as a result of working at tradeshows. These hours that were worked by myself and my co-workers were not recorded on the Kronos Time System. This statement is also inaccurate because we worked many overtime hours on the weekends for Defendant. On these occasions, Defendant's management instructed us not to log into the Kronos System. As a result, I do not believe that the Release is accurate in stating that all of our hours worked were accurately recorded on the Kronos System.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14th day of August, 2008 at

______________________, ________________.

____
Noemee Gabisan

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NOEMEE GABISAN, on behalf of herself, and on behalf of all persons similarly situated, Plaintiff, vs. PELICAN PRODUCTS, INC.; and, Does 1 to 10, Defendants.	CASE No. 08 CV 1361 JM (NLS) **DECLARATION OF CAROLE WILSON-MCGHEE IN SUPPORT OF PLAINTIFF'S MOTION AND EMERGENCY MOTION FOR CORRECTIVE NOTICE TO MEMBERS OF PUTATIVE CLASS** Judge: Hon. Jeffrey T. Miller Dept.: Courtroom 16, 5th Flr Hearing Date: September 19, 2008 Hearing Time: 1:30 p.m.

I, CAROLE WILSON-MCGHEE, declare:

1. I have personal knowledge as to the facts stated in this declaration. If called as a witness, I could and would competently testify to the truth of the facts stated in this declaration. I make this declaration in support of Plaintiff's Emergency Motion for Corrective Notice.

2. I have worked for Pelican Products, Inc. ("Defendant") since in or about September of 2006. On or about August 4, 2008, I attended a meeting with, Ellenmary Michael, Director of Defendant's Human Resources division. Ms. Michael presented me with an "Agreement and Release" (the "Release"), which contains a purported waiver of claims asserted in the action, Noemee Gabisan v. Pelican Products, Inc., 08 CV 1361 JM (NLS). This waiver is the basis of Plaintiff's Emergency Motion for Corrective Notice.

3. The Release was presented to me by Ms. Michael on a take-it or leave-it basis. There was no opportunity for negotiation of any of the terms of the agreement. As such, I did not understand that as a result of the wording of the Agreement and Release that important rights protecting my ability to pursue claims pursuant to Business and Professions Code § 17200, *et seq.* (the "UCL"), the Fair Labor Standards Act 29 U.S.C. 201, *et seq.* (the "FLSA"), the California Labor Code § 510, *et seq.*, and the Private Attorney General Act of 2004 may be eliminated by the Release.

4. The Release inaccurately states that the time I worked was accurately recorded on "Pelican's Kronos Time & Attendance System." This statement is inaccurate because on many occasions, I worked many overtime hours as a result of working at tradeshows. These hours I worked were not recorded on the Kronos Time System.

5. Ms. Michael stated that the purpose of the Release was to pay me for the overtime I worked during my employment with Defendant. This statement, as well as the terms in the

Release stating the same, appear to be inaccurate as the overtime as per the Release is based on a rate of pay calculated on the salary I was paid last year during 2007, even though the Release also purports to pay me for the overtime I worked during the year of 2008. The Release based my rate of pay on my older salary of 2007, rather than the higher salary I was paid for most of 2008. As a result, the Release does not accurately state that I will be paid "an amount equal to or in excess of amounts [I] would have been paid had my position been classified as non exempt…"

6. Ms Michael did not explain to me why Defendant was only going to base all of the backpay owed to me on my older and lower salary. Ms Michael also did not explain to me in any detail the consequences of the language of paragraph 2 of the Release. Nor did Ms Michael advise me to seek outside counsel to determine whether my rights would be adequately protected by signing the Release

7. In or about the week of August 4, 2008, I spoke with Ms. Dana Brooks, a representative from Defendant's Human Resources Department, regarding the Release. I informed her about certain discrepancies in the backpay Defendant was attempting to pay me that resulted from the omission from the hours I worked at the trade shows I also informed Ms. Brooks about my dissatisfaction for Defendant's use of a rate of pay based on my older salary.

8 On or about August 11, 2008, I spoke with Ms. Brooks about my concerns regarding the Release In response, Ms. Brooks insisted that I should immediately sign the Release. Ms. Brooks also represented that the discrepancies regarding my rate of pay and the missing hours would be addressed by Defendant at a later date after I sign the Release. As a result of Ms. Brooks' insistence that I sign the Agreement and Release, before the document is revised to incorporate the terms to which I would agree, I refused to sign the Release.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14 day of August, 2008 at Torrance, California.

Carole Wilson McGhee

Carole Wilson McGhee

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Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NOEMEE GABISAN, on behalf of herself, and on behalf of all persons similarly situated, Plaintiff, vs. PELICAN PRODUCTS, INC.; and, Does 1 to 10, Defendants.	CASE No. 08 CV 1361 JM (NLS) PROOF OF SERVICE

CERTIFICATE OF SERVICE

I, am, at all relevant times, was a citizen of the United States and a resident of the County of San Diego and am employed by the attorney of record in this action located at 2255 Calle Clara, La Jolla, CA 92037. I hereby certify that the following document(s):

(1) PLAINTIFF'S EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME;

(2) PLAINTIFF'S NOTICE OF EMERGENCY MOTION AND EMERGENCY MOTION FOR CORRECTIVE NOTICE TO MEMBERS OF PUTATIVE CLASS;

(3) PLAINTIFF'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF EMERGENCY MOTION FOR CORRECTIVE NOTICE TO MEMBERS OF PUTATIVE CLASS;

(4) DECLARATION OF NOEMEE GABISAN; AND,

(5) DECLARATION OF CAROLE WILSON-MCGHEE

have been sent via Process Server to CSC-Lawyers and via Federal Express Standard Overnight delivery and via E-mail to the attorney(s) for the Defendant, General Counsel for Pelican Products, Inc. at the following address(es):

CORPORATION SERVICE COMPANY WHICH WILL DO BUSINESS IN CALIFORNIA AS CSC - LAWYERS INCORPORATING SERVICE
2730 GATEWAY OAKS DR STE 100
SACRAMENTO, CA 95833

Jackie Romano, Esq., General Counsel for:
PELICAN PRODUCTS, INC.
23215 EARLY AVENUE
TORRANCE, CA 90505
jromano@pelican.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 14, 2008 at San Diego, California.

By: s/Norman B. Blumenthal
Norman B. Blumenthal